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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/067,515

Filing Date: February 04, 2002

Appellant(s): LEDERMAN, STEVEN

Carol Burton
For Appellant

SUPPLEMENTAL EXAMINER'S ANSWER

This is in response to the appeal brief filed 5-5-04.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 21-60 do stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

5,028,446	SALEEB et al.	7-1991
5,468,506	ANDON	11-1995
5,500,232	KEATING	3-1996
WO 92/19251	ANDON et al.	12-1992

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Appellant failed to timely respond to the examiner's answer mailed on 6-20-07 that included a new ground of rejection mailed on 6-20-07. Under 37 CFR

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41.39(b), if an examiner's answer contains a rejection designated as a new ground of rejection, appellant must, within two months from the date of the examiner's answer, file either: (1) a request that prosecution be reopened by filing a reply under 37 CFR 1.111; or (2) a request that the appeal be maintained by filing a reply brief under 37 CFR 41.41 addressing each new ground of rejection, to avoid *sua sponte* dismissal of the appeal as to the claims subject to the new ground of rejection. In view of appellant's failure to file a reply under 37 CFR 1.111 or a reply brief within the time period required by 37 CFR 41.39, the appeal as to claims 28, 30, 33-38, 40 **is dismissed, and these claims are canceled.**

Only claims 21-27, 29, 31, 32, 39, 41, 42 remain in the application. The appeal continues as to these remaining claims. The application will be forwarded to the Board after mailing of this communication.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 21-26, 27, 29, 31, 32, 39, 41, 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Saleeb et al. (Saleeb).

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Saleeb et al. disclose as in claims 21, 26 and 27 a method of making a calcium containing product by making a slurry of fumaric acid and water and a calcium containing aqueous suspension under shear conditions at temperatures not over 160 F. and drying the mixture (abstract and col. 4, lines 16-34). A spray-dried product as in part ii is disclosed. The product is considered to contain solubilized calcium having improved organoleptic properties and enhanced rate of solubilization because the same process is used which would also make for an amorphous structure.

The calcium mixture is incorporated into a beverage such as tea as in claim 22 (col. 7, lines 1-9).

The powder is incorporated into gelatin as in claim 23 (col. 7, lines 24-45).

Vacuum drying, spray, drum oven and with or without vacuum drying the calcium product is disclosed by Saleeb et al. as in claim 31 (col. 3, lines 48-54).

The composition of Saleeb et al. is considered to be fiber-free as in claim 39 (abstract).

As the method has been disclosed above the product is considered to have been shown as in claim 41.

The product combined with water to make a liquid supplement is disclosed in col. 4, lines 47-55 as in claim 42.

Claims 21, 22, 23, 26, 27, 31, 39, 41, 42 differ from the reference as in claim 21, in that by fully solubilizing the aqueous slurry in an aqueous acid solution that a dried solubilized calcium product having an amorphous structure

is made. However, Saleeb et al. also fully solubilize their aqueous solution containing calcium in an aqueous acid solution because they also mix ingredients as appellant does (col. 2, lines 1-55). Even though Appellant states that his product is amorphous, no limitations have been put into the claims to achieve such a product and to define over the reference. Nothing in the form of a showing has been shown that Appellant's product is more amorphous than that of the reference, which only discloses "generally crystalline" (col. 2, lines 14-18). Therefore, it would have been obvious to make a product, which would be as amorphous as shown by the process to Saleeb et al.

Claim 24 requires solubilizing the dried compound in water. Saleeb et al. disclose adding the composition to water to make a beverage, i. e. solubilizing the compound, which can be a tea drink (claim 25) (col. 7, lines 5-21). Nothing new is seen in packaging the product in a sealed container because beverages in containers are well known. As the method of making the composition has been shown, the product would have had the claimed shelf life of 6 months. The composition is seen to be amorphous, as the process has been shown. Therefore, it would have been obvious to package a product in a container and to make a product with a shelf life of six months.

Claim 29 requires that the temperature be attained by an exothermic reaction-taking place during acidification of the slurry. Saleeb et al. disclose that the reaction can be exothermic depending on the reactants. When calcium hydroxide is used the reaction is exothermic (col. 6, lines 40-60). Therefore, it

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would have been obvious to have an exothermic reaction depending on the reactants.

Claim 32 requires that the calcium compound is freeze - dried. Saleeb et al. disclose that various means of drying can be used (col. 3, lines 48-54). Certainly, freeze drying is another well known method of drying and nothing new is seen in its use. Therefore, it would have been obvious to freeze dry the product.

(11) Response to Argument

Appellant argues that the reference to Saleeb does not teach their claimed method, in that they first make an aqueous slurry containing calcium, then fully solubilize the aqueous slurry in an aqueous acid solution to produce a solution containing solubilized calcium, and then drying the solution to obtain an amorphous structure and that Saleeb teaches a method of making a generally crystalline structure (col. 1, lines 63-64). Saleeb teaches making a slurry of water and fumaric acid, and also a mixture of calcium hydroxide and water. The calcium hydroxide suspension was added slowly to the fumaric acid slurry at a temperature of 160 F. (col. 4, lines 16-34) and after stirring was vacuum dried. It is not seen how this process is different than the process of claim 21. Appellant argues that the reference to Saleeb et al. teach a method of making a generally crystalline structure (col. 1, lines 63-64) and this is done by a particular process (page 5, last full paragraph) and that large amounts of water are used to perfect crystal growth, and if the calcium fumarate is not a crystalline structure, it will not

be soluble and will clump. Therefore, this composition is not an amorphous calcium product. However, it is not seen how the process claims distinguish over the reference and the Appellant's use of the word "amorphous" is seen to be a statement of intended results. Therefore, it is seen that the structure of the reference is as amorphous as the structure of the claims.

The significance of the argument that Saleeb first prepares an acid slurry which is not fully solubilizable" (col. 2, lines 42-48) is not seen because all claim 21 requires is making an "aqueous acid solution" which is combined with the calcium slurry and as above Saleeb does teach an aqueous acid solution (col. 24, lines 16-25).

Appellant argues that Saleeb teaches a method of making the product so that the product is crystalline. However, Appellants method does not require any particular order to define over Saleeb in the use of the term "comprising".

Appellant argues that even if the limitations of claims 21-27, 29, 32, 39, 41 and 42, 47-60 are met, that an amorphous product is not made in independent claim 26. The appellant also argues that Saleeb does not teach making an amorphous product and teaches away since Saleeb states that amorphous products are insoluble. Since the composition claims depend from the method claims, it is seen that the products of the method of the combined references are as amorphous as those made by the claimed methods. Where the claims are product by process claims, no showing has been made that the products are different. The fact that the procedures of the reference are different than that of applicant is not a sufficient reason for allowing the product-by-process claims

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since the patentability of such claims is based upon the product formed and not the method by which it was produced. See *In re Thorpe* 227 USPQ 964. The burden is upon applicant to submit objective evidence to support their position as to the product-by-process claims. See *Ex parte Jungfer* 18 USPQ 2D 1796.

In conclusion, it is seen that the claimed product and process of making a calcium containing product are obvious given that the limitations of the claims are shown by the combined references.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Helen F. Pratt/

Primary Examiner, Art Unit 1794

Hp

3-6-08

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